93

(3)

No. 07-1095

FILED

MAY 12 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ORIENT MINERAL COMPANY and
WIL-BAO MINERAL CO., LTD.,
Petitioners,

v.

BANK OF CHINA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION WITH SUPPLEMENTAL APPENDIX

ALLAN O. WALSH
McKAY, BURTON & THURMAN
170 S. MAIN STREET
SUITE 800
SALT LAKE CITY, UT 84101
(801) 521-4135

ROBERT W. LUDWIG, JR.
Counsel of Record
CARL F. LETTOW II
LUDWIG & ROBINSON, PLLC
818 CONNECTICUT AVE., N.W.
WASHINGTON, D.C. 20006
(202) 289-1800

Counsel for Petitioners Orient Mineral Company and Wil-Bao Mineral Co., Ltd.

May 12, 2008

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PETITIONERS' REPLY TO BRIEF IN OPPOSITION 1

I. RESPONDENT'S CONTENTION THAT THE DECISION BELOW IS NOT FINAL IS FRIVOLOUS 2

II. RESPONDENT'S CONTENTION THAT *NELSON'S* DEFINING OF "COMMERCIAL ACTIVITY" IS PROPERLY USED BY THE TENTH AND OTHER CIRCUITS TO DEFINE "SUBSTANTIAL CONTACT" UNDERSCORES A NEED FOR REVIEW 2

CONCLUSION 12

SUPPLEMENTAL APPENDIX

Errata for Petition Appendix Citations 1sa

Excerpts from
Second Amended Complaint in the
United States District Court
District of Utah, Central Division
filed May 28, 2004 ..... 2sa

Excerpts from
District Court's Findings of Fact and
Conclusions of Law in the
United States District Court
District of Utah, Central Division
entered January 26, 2005 ..... 18sa

TABLE OF AUTHORITIES

Page(s)

CASES

BP Chemicals Ltd. v. Jiangsu SOPO Corp.,
420 F 3d 810 (8th Cir. 2005)..... 5-7

Budinich v. Becton Dickinson & Co.,
486 U.S. 196 (1988)..... 2

City of New Orleans v. Dukes,
427 U.S. 297 (1976)..... 2

Globe Nuclea Servs. & Supply, Ltd. v. AO Techsnabexport,
376 F.3d 282 (4th Cir. 2004)..... 6

Gould, Inc. v. Mitsui Mining & Smelting Co.,
947 F.2d 218 (6th Cir. 1991)..... 6

In re Minister Papandreou,
139 F.3d 247 (D.C. Cir. 1998)..... 6

INS v. Cardozo-Fonseca,
480 U.S. 421 (1987)..... 2

Kensington Int'l, Ltd. v. Itoua,
505 F.3d 147 (2d Cir. 2007)..... 5, 7

Kirkham v. Air France,
429 F.3d 288 (D.C. Cir. 2005)..... 7

McGee v. Int'l Life Ins. Co.,
355 U.S. 220 (1957)..... 1, 4, 6, 7

Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352 (2007) 5

Republic of Argentina v. Weltover, Inc., 941 F.2d 145 (2d Cir.), *aff'd*, 504 U.S. 607 (1992) 11

Saudi Arabia v. Nelson, 507 U.S. 349 (1993) ..... *passim*

Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands, 174 F.3d 969 (9th Cir. 1998) 5

Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887 (5th Cir. 1998) 11

STATUTES

28 U.S.C. § 1254 2

28 U.S.C. § 1291 2

28 U.S.C. § 1602 11

28 U.S.C. § 1603(d) 3

28 U.S.C.§ 1603(e) 3, 5, 11

28 U.S.C. § 1605(a)(2) 3, 5, 11

28 U.S.C. § 1606 11

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

In their petition, Petitioners demonstrated that the decision below: (1) widens a conflict under clause one of the Foreign Sovereign Immunities Act ("FSIA") over the term "substantial contact" left unresolved in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (Pet. 16-27); (2) conflicts, as to clause two, with decisions holding its view of instruments placed in U.S. commerce "entirely anomalous" (Pet. 27-29); (3) conflicts, as to clause three, with decisions of the Court and Second Circuit in limiting jurisdiction to part of a transaction or occurrence, and splitting claims between U.S. courts and China (Pet. 29-32); (4) presents important and recurring questions, such as the meaning of "substantial contact," derived from *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (Pet. 33-37); and (5) sanctions "grossly unfair" departures that call for this Court's supervision. (Pet. 37-38.)

Respondent does not dispute any of these points,[1] except the first concerning the clause-one conflict, that it attempts to minimize through a novel argument that *Nelson* removed any conflict over a question it did not reach. Instead, in its opposition, Respondent addresses principally a supposed lack of finality, and then the merits, of the decision below, but fails to advance any reason why that decision ought not to be reviewed by this Court.

---

[1] *See* Opp. 24 (no discussion of clause two and three conflicts, or of cramped view of clause three to limit jurisdiction to split claims); Opp. 23-25 (no discussion of meaning of "substantial contact" or *McGee*, or of district court's limiting discovery to third of five transfers, yet subjecting Petitioners to trial on all).

I. RESPONDENT'S CONTENTION THAT THE DECISION BELOW IS NOT FINAL IS FRIVOLOUS

Respondent resists review by miscasting the decision below as "undeniably interlocutory." (Opp. 11-13). The Tenth Circuit rendered a final judgment on jurisdiction and the merits, remanding only a "claim for attorney's fees." (Pet. App. 57a.) As this Court has held, "we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). "Courts and litigants are best served by a bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of § 1291, whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Id.* at 202-03.[2]

II. RESPONDENT'S CONTENTION THAT *NELSON'S* DEFINING OF "COMMERCIAL ACTIVITY" IS PROPERLY USED BY THE TENTH AND OTHER CIRCUITS TO DEFINE "SUBSTANTIAL CONTACT" UNDERSCORES A NEED FOR REVIEW

Respondent otherwise opposes certiorari by contending this Court's decision fifteen years ago in *Nelson* makes it unnecessary to address the all too

---

[2] The Court has also used a "'finality' test" for 28 U.S.C. § 1254. *City of New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976). Respondent's cases involve remand of a central issue. Even in such cases, this Court has granted review "to resolve a Circuit conflict. . . ." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 426 (1987).

evident circuit conflicts. *Nelson* expressly did not decide conflicts that were then apparent and have now caused increased divergence. Just as important, the Tenth Circuit and other courts have misapplied *Nelson* as bearing on an issue that decision never reached, creating *more* conflict and confusion, not less. This situation only reinforces the need for this Court to issue a writ of certiorari in this case.

1. Respondent asserts that this Court, having in *Nelson* construed the term "commercial activity" in deciding the *nature* of activity under 28 U.S.C. §§ 1605(a)(2) and 1603(d), need not engage in "judicial parsing or interpretation" of the phrases "commercial activity carried on in the United States" and "substantial contact" under §§ 1605(a)(2) and 1603(e) in deciding the *jurisdictional nexus* of that activity. (Opp. 17, 23-24). This Court, however, speaking through Justice Souter, expressly did not decide the jurisdictional issue: "Because we conclude that the suit is not based upon any *commercial activity*, we need not reach the issue of *substantial contact* with the United States." 507 U.S. at 356 (emphasis added). Yet Respondent claims *Nelson* supplies the "applicable rule," and that the decision below involves at most "misapplication of a properly stated rule of law." (Opp. 15, 18). There is no "properly stated rule," as this Court never addressed the issue.

Respondent similarly asserts Petitioners "try to evade" *Nelson*'s "analytical starting point," of "'identifying the *particular* conduct on which the [plaintiffs'] action is 'based','" namely the "'elements of a claim,'" (Opp. 16-17). While such analysis may ensure the *nature* of each act is not sovereign – a

"starting point" inapplicable to this case since the commercial nature of Respondent's acts is undisputed – this case requires a jurisdictional analysis under clause one that considers the scope of Respondent's conduct and its "substantial contact" with the United States. Respondent's argument ignores *Nelson's* limited holding, and Justice Stevens' caution: "These two conditions should be separately analyzed because they serve different purposes." 507 U.S. at 377 & n.2 (Stevens, J., dissenting). It also overlooks guidance in concurring and dissenting opinions which did address "substantial contact."[3] It likewise ignores *McGee*, from which Congress derived the standard. (Pet. 35-37.) *McGee* involved only three contacts, none considered elements of a claim, holding instead: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." 355 U.S. at 223.

2. Respondent does not deny a clause-one conflict was identified by the courts of appeals themselves as warranting this Court's resolution, (Pet. 14, 19), but contends any conflict "[p]re-dates *Nelson*" and is "illusory." (Opp. 15.) That is not true.

---

[3] Justice White recognized that activity can *either* be "carried on in the United States," or as defined, have "substantial contact" through a "sufficient nexus" or "connection to this country." 507 U.S. at 370 (White, J., concurring). Justice Kennedy applied a similar analysis, noting the activities had "more than substantial contact with the United States; most of them were 'carried on in the United States.'" *Id.* at 372-73 (Kennedy, J., dissenting). Justice Stevens concluded: "Whether the first clause . . . authorizes 'general' . . . [or] only 'specific' jurisdiction over . . . claims that have a substantial contact with the United States, petitioners' contacts are, in my view, plainly sufficient," *id.* at 379 (Stevens, J., dissenting).

While this Court tried in *Nelson* to set out a general guide to interpretation of the FSIA and clause one, that effort has not reduced the divergence over clause one's jurisdictional scope. The same conflicts remain, and have become exacerbated since.

Respondent also does not dispute the Tenth Circuit's precedent-setting approach to clause one was "literal," (Opp. 14, 18),[4] or that the Ninth Circuit applied a "doing business" standard in *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*, 174 F.3d 969 (9th Cir. 1998),[5] completing, among the circuits, a four-way doctrinal split left undecided in *Nelson*. The Second and D.C. Circuits applied a "tighter nexus" standard before *Nelson*, (Pet. 19-20, 36 n.3), and after, followed by the Eighth Circuit. *See Kensington Int'l, Ltd. v. Itoua*, 505 F.3d 147, 155 (2d Cir. 2007)("'greater than common law causation'"); *BP Chemicals Ltd. v. Jiangsu SOPO Corp.*, 420 F.3d 810, 818 n.6 (8th Cir. 2005)("nexus requirements . . .

---

[4] Respondent attempts to justify the approach as consistent with rules of construction. But the approach has been rejected by other circuits precisely because it does not follow the cardinal rule of construction that *all* of the statute be considered, as Justice Thomas reminds: "begin . . . with the text of the statute." *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356 (2007). The Tenth Circuit focused on only part of the text: "commercial activity carried on in the United States," § 1605(a)(2), without considering the rest, § 1603(e), which defines that phrase to "mean[] commercial activity carried on by such state and having substantial contact with the United States."

[5] Contrary to Respondent's argument, *Theo. H. Davies & Co.* is in direct conflict, finding jurisdiction although the breach, by "refus[al] to pay the balance," occurred in the Marshall Islands. 174 F.3d at 972. Here, the Tenth Circuit denied jurisdiction, literally requiring an actionable wrong in the United States.

probably exceed" minimum contacts); *In re Minister Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998). The D.C. Circuit reaffirmed its *pre-Nelson* holding that "substantial contact" "requires more than minimum contacts," *id.* at 253, still overlooking the term comes from the "substantial connection" equivalent to minimum contacts set out in *McGee*. Yet it is one of few courts noting that *Nelson* left the "***'substantial contact' issue open.***" *Id.* (emphasis added).

Other circuits still apply a fourth "nexus" approach, (Pet. 18-19), as in *Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004). The Fourth Circuit was not "reversed" by *Nelson* as Respondent mistakenly states, and is not "like the Tenth Circuit" (Opp. 17-18), but in square conflict. The Fourth Circuit applied *Nelson's* starting point to determine the *nature* of the activity, 376 F.3d at 286-91, after which it applied jurisdictional principles in finding that from "these ties, it is clear that [defendant's] conduct has 'substantial contact' with the United States," *id.* at 291-92.

Those post-*Nelson* cases that apply *Nelson's* "based-on elements" analysis for "commercial activity" to whether the activity had "substantial contact" – yet a fifth approach – are in conflict with the Fourth and Sixth Circuits. *See Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991)("'commercial activity' is the jurisdictional element" not "the elements of the cause of action," finding activity "involved substantial contact with the United States"). They also conflict with each other, spawning further inconsistency. For example, the Eighth Circuit, in finding jurisdiction, ruled

"only one element" "must concern commercial activity conducted in the United States." *BP Chemicals,* 420 F.3d at 816. The D.C. Circuit has more broadly held: "we think it more consistent with *Nelson* and the FSIA to read 'elements' as referring to *each fact necessary* to establish a claim." *Kirkham v. Air France,* 429 F.3d 288, 292 (D.C. Cir. 2005) (emphasis in original). In contrast, the Second Circuit, in denying jurisdiction, holds more narrowly that "the 'based upon' element requires a 'degree of closeness . . . considerably greater than common law causation requirements.'" *Kensington,* 505 F.3d at 155. Remarkably, besides relying upon *Nelson* for a jurisdictional analysis this Court never made, decisions like *Kirkham* and *Kensington* never mention, let alone apply, the "substantial contact" standard. Thus the circuits, without this Court's guidance, are adding yet more "gloss" and departing even further from the language and purpose of the statute. Meanwhile, the Court's decision in *McGee* remains hidden in plain view, for over forty years.

Respondent questions "how another ruling of this Court will resolve a circuit conflict that *Nelson* apparently failed to resolve." (Opp. 16.) Absent from its brief is any explanation how these conflicts could be resolved without this Court's ruling.

3. Respondent's remaining arguments, directed to the merits, are erroneous. While there are factual disputes between the parties,[6] they do

---

[6] For example, there is a significant anomaly in conclusions drawn below. In the petition, Petitioners did not assign dates to two bank meetings, (Opp. 5-6), but did inadvertently imply, as they alleged (SAC ¶19, Reply App. 6sa), that the Wil-Bao

not affect the facts needed to resolve any of the three jurisdictional questions presented for review.[7]

Respondent persists in mischaracterizing the single $400,000 transfer as a "claim," (Opp. 8), when it merely was the third of five unauthorized transfers covered by each claim. (Reply App. 8sa-9sa, SAC, ¶¶28-32). The First Amended Complaint (May 25, 2001) and Second Amended Complaint ("SAC") plead, *inter alia*, contract, negligence and fraud "claims," alleging, for example, Respondent breached its contract by: "(a) failing to follow directions given by Preston Jones . . . to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and control, and (b) failing to take

---

resolution was given at the first. After that meeting, on May 27, 1996, the court found key facts the Bank denied: (a) a second meeting occurred on May 29; (b) Jones gave the Bank authorization to transfer $1.215 million from Wil-Bao's account; and (c) the resolution, in Chinese, confirming his sole authority to authorize disbursements over $25,000, was presented "[m]ore likely than not" on May 29, not May 27. (Opp. App. 22a-25a; Pet. App. 11a-12a.) The court indicated that had the resolution been presented on May 27, it would have found the Bank was "alerted to [a] specific need to ascertain the intentions of Mr. Jones concerning the Wil-Bao account through direct communication with Jones," (FF/CL ¶¶ 427, 429, Reply App. 19sa-20sa). The lower courts never explained why presentation on May 29 failed to cause the Bank to ascertain Jones' intentions "directly," while presentation on May 27 would, or why his $1.2 million authorization did not also serve that purpose, if the Bank believed he relinquished control two days before. Both events took place before the first two unauthorized transfers on June 4 and 5, 1996.

[7] Despite Respondent's "alarmism" that Petitioners seek review of the "factual record from the 13-day bench trial," (Opp. 14), Petitioners only seek to have this Court clarify the proper scope of FSIA jurisdiction, and remand for discovery and a new trial.

reasonable safeguards to prevent the unauthorized transfer of funds," (SAC, ¶57, Reply App. 13sa). This contract "claim" incorporated, and encompassed, all five unauthorized transfers, which the courts below were bound to consider as one unified claim, "under [Petitioners'] theory of the case," *Nelson*, 507 U.S. at 357, as well as usual pleading rules.

Respondent also attempts to suggest this case is an unsuitable "vehicle" for review, contending "nearly all of the acts complained of . . . did not involve commercial activity in the United States." (Opp. 23.) This contention invites the same error below, through a repudiated half-literal reading of clause one, which does *not* "'require the act complained of to occur in the United States.'" (Pet. 18-19)(citations omitted). To the extent Respondent contends this action is not based upon activity that had "substantial contact" with the United States, the record is otherwise. The following significant facts and allegations are part of the record below:

a) Bank letter offering to safeguard funds was meant for and received by "the American party" in Nevada (Pet. App. 78a, 102a; Pet. 4, 29 n.2);[8]

b) contract was "created . . . in the United States" as "[t]he district court agreed" (Pet. App. 28a n.18);

---

[8] Despite Respondent's contentions, (Opp. 4-6), while this letter was "addressed and given to Yue in China," (Pet. App. 39a), it was "addressed" to Yue of "Sino-U.S. Joint Venture Henan Wil-Bao," (Pet. App. 78a), "acting as Wil-Bao's general manager," (Pet. App. 6a), and its assurances were meant for "the American party," (*id.*), as its author admitted. (Pet. App. 102a.)

c) letter induced the American party to wire funds from the United States (*Id.;* Pet. App. 50a-51a & n.29);

d) "Plaintiffs initiated [transfer] of US$ 3 million" "through [branch] in New York" (FF/CL ¶74, Reply App. 19sa);

e) Bank took custody of the funds in New York (*id.*; *cf.* Pet. App. 100a);

f) performance by two transfers through the New York branch to Nevada, authorized by Jones in Tennessee (Pet. App. 13a, 29a; SAC ¶26, Reply App. 7sa-8sa);

g) breaches through five unauthorized transfers, (SAC, ¶¶28-32, Reply App. 8sa-9sa), including the third transfer to Utah through the New York branch (Pet. 12, Pet. App. 100a);

h) omissions to obtain Jones' authority in Tennessee for five unauthorized transfers (Pet. App. 26a n.17).

4. Finally Respondent urges that the analysis "should focus on the text of the [sic] 28 U.S.C. § 1605(a)(2)," as "the 'substantial contact' component of 28 U.S.C. § 1603(e) is irrelevant" herein. (Opp. 23-25.) Such an approach miscasts the statute, and by positing the wrong clause one standard, can only

reach the wrong result, as demonstrated by this case.[9]

The analysis requires focus not just on the text of § 1605(a)(2), but of its definition, § 1603(e), that Respondent would disregard. *See* note 4, *supra.* It also requires concern for statutory purpose, set out in § 1602 ("protect the rights of . . . litigants"), and § 1606 ("the foreign state shall be liable in the same manner and to the same extent as a private individual"). This Court, by Justice Scalia, unanimously affirmed a decision that noted: "We have cautioned that . . . courts must be concerned with Congress' goal of opening the courthouse doors 'to those aggrieved by the commercial acts of a foreign sovereign.'" *Republic of Argentina v. Weltover, Inc.*, 941 F.2d 145, 151 (2d Cir.), *aff'd*, 504 U.S. 607 (1992). In *Nelson*, Justices Stevens and White suggested a similar "touchstone":

> If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be the touchstone of our inquiry; for as Justice White explains, when a foreign nation . . . seeks out the benefits of the private marketplace, it must, like any private party, bear the . . . responsibilities imposed by that marketplace.

507 U.S. at 379 (Stevens, J., dissenting).

---

[9] This precedent, unless reviewed by the Court, will lead to further such results, much as the Tenth Circuit relied on *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998) throughout the decision below, (Pet. App. 22a-24a, 36a-37a), and no doubt its *dicta* stating the same wrong standard for clause one. (Pet. 21.)

CONCLUSION

None of Respondent's objections casts doubt on this case's appropriateness for resolving widening conflicts, and important and persistent questions of federal law, which directly undermine the purposes of the FSIA. The petition for writ of certiorari should be granted.

APPENDIX

SUPPLEMENTAL APPENDIX A

ERRATA FOR PETITION APPENDIX CITATIONS

Petition Page	Citation	Corrected Citation
p. 2	App. 134a-14-a	App. 134a-140a
p. 8	App. 93a-96a	App. 93a-95a
p. 9	App. 104a-105a	App. 103a-105a
p. 10	App. 74a	App. 74a-76a
p. 12	App. 53a	App. 42a
p. 23	App. 24a-26a	App. 25a

SUPPLEMENTAL APPENDIX B
EXCERPTS FROM SECOND AMENDED COMPLAINT
Filed May 18, 2004

Allan O. Walsh, Esq. (6149)
McKAY, BURTON & THURMAN
170 South Main Street, Suite 800
Salt Lake City, UT 84101
Telephone: (801) 521-4135

Robert W. Ludwig, Jr., Esq.
LUDWIG & ROBINSON, P.L.L.C.
555 11th St., N.W., Ste. 850
Washington, D.C. 20004
Telephone: (202) 289-1800

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ORIENT MINERAL COMPANY and WIL-BAO MINERAL CO., LTD.	: Case No. 2:98CV00238J
Plaintiffs	: **SECOND AMENDED COMPLAINT**
v.	:
BANK OF CHINA, *et al.*	:

: Judge Bruce S. Jenkins

Defendants. :

COMES NOW, for their causes of action against Defendants and each of them, Plaintiffs Orient Mineral Company and Wil-Bao Mineral Co. Ltd. complain and allege as follows:

* * *

BACKGROUND

9. In June 1995, plaintiff Orient Mineral entered into an agreement with Jiaocun Gold Co. of the People's Republic of China, to form a joint venture known as Wil-Bao Mineral Co. Ltd., for the purpose of mining gold in the People's Republic of China.

A. Yue's Scheme with Bank of China

10. By commitment letter of May 14, 1996, received by Orient Mineral in Nevada, the Bank of China offered and represented that it would be responsible for safekeeping Orient Mineral funds remitted to a suspense account in its name, subject to its control, and that funds in the account would be disbursed to Wil-Bao in accordance with the arrangements and instructions of Orient Mineral's representative. Accepting this offer by letter and board resolution of May 16, 1996 designating Preston Jones as its representative, and in reliance on the Bank's representations, Orient Mineral wired

US $3 million to the Bank's branch in Ling Bao, China. These funds were wired through its New York branch, and received into the Orient Mineral suspense account in Ling Bao on or about May 27, 1996.

11. On May 27, 1996, representatives of Orient Mineral and Wil-Bao, including Mr. Jones as special director of each, met with three senior officers of the Bank's Lingbao branch: Wang Yin Chuan, Deputy Branch Manager; Liu Lin, Head of Accounting and Business Departments; and Zhou Xiuxia, Deputy Head of Business Department.

12. At this meeting, the Bank was presented with the May 16, 1996 letter and board resolution of Orient Mineral, identifying Preston Jones as its sole and exclusive representative, and agreeing to hold the Bank harmless provided it followed the directions of Preston Jones.

13. By these two documents from Orient Mineral, which were translated by branch staff, the three Bank officers knew that Mr. Jones was the sole and exclusive representative of Orient Mineral for arranging the disposition of its funds. The Bank officers also knew from these documents that the Americans were concerned about possible misuse of the funds by local Chinese including Yue, and further of the clear risk to the customer that absent a control facility for transferring the funds to Wil-Bao as needed, the funds would be within the exclusive control of Yue as its General Manager.

14. Despite having branch staff translate the Orient Mineral documents identifying Preston Jones as its sole and exclusive representative, and having clear contractual and professional duties to follow his directions, the three bank officers did not use the same branch staff for understanding and following the instructions of Preston Jones.

15. Instead, the three bank officers used and relied upon Yue as interpreter for the instructions of Preston Jones, and purportedly determined that Preston Jones wished to transfer the entire US $3 million all at once to the Wil-Bao USD account.

16. The three bank officers did this even though they knew the clear risk of transferring the funds to the exclusive control of Yue, and were purportedly quite surprised that Preston Jones did not follow the common practice of foreign investors of maintaining their investment funds in a suspense account for transfer as needed to a Chinese joint venture.

17. In fact, the actual intent and directions of Preston Jones, on behalf of Orient Mineral, were to maintain the suspense account in Orient Mineral's name, or to open a new Orient Mineral account as a control account, in each case subject to his control for all transfers as needed to Wil-Bao. Failing that, his actual intent and direction was, alternatively, to establish a $25,000 restricted Wil-Bao USD account, subject to his approval and control.

18. Further, the actual intent and directions of Preston Jones, on behalf of Wil-Bao, were to establish a $25,000 restricted Wil-Bao USD account, subject to his approval and control.

19. In support of his alternative direction, Preston Jones provided a resolution of the board of directors of Wil-Bao, in Chinese and English, stating that any withdrawals or transfers in excess of $25,000 from the account to be opened with the Bank required the signature of Preston Jones. The Bank of China accepted and promised to observe such restrictions and conditions on the account to be opened.

20. In addition to failing to follow any of the directions given by Preston Jones, the three bank officers did not perform any normal "know-your-customer" due diligence at the May 26, 1996 meeting, including, but not limited to: determining customer intentions; understanding and following customer directions; following policy and procedure to utilize available English-competent staff; exercising normal vigilance to avoid fraud; advising customers of regulatory rules and prohibitions; reviewing documentation provided by the customer and raising regulatory issues and restrictions; and observing a Wil-Bao board resolution or obtaining from the customer an official letter or its equivalent.

21. Instead, the three bank officers permitted the opening and operation of a Wil-Bao USD foreign exchange account without a required registration certificate issued by the State Administration for Exchange Control ("SAEC") of

the central bank of China, which was in violation of strict SAEC regulations and bank policy.

22. In the absence of an SAEC registration certificate, the bank officers further failed to follow the alternative procedure mandated by SAEC regulations and bank policy, of allowing only a temporary USD account, also approved by SAEC, with a complete block on transfers for ninety days, after which it was required to have been closed.

23. The bank officers also failed to ensure that Wil-Bao obtain SAEC approval to convert the USD account that was opened to a capital account and, following SAEC approval to effect the re-registration by September 30, 1996, or close the account as required by SAEC regulations.

24. In each instance, the Bank thereby avoided SAEC oversight over the account.

25. Based upon the above acceptances, promises and representations, Orient Mineral and Wil-Bao entered into banking contracts with Bank of China, and, thereafter, transferred the sum of $2,999,990 from the Orient Mineral suspense account into the Wil-Bao USD account, fully believing that the Bank had followed Preston Jones' alternative direction that said account bear a $25,000 restriction, subject to his authorization and control.

26. On May 29, 1996, pursuant to that direction and $25,000 restriction, Preston Jones gave written authorization to Mr. Wang, Deputy General

Manager of the Bank's Ling Bao branch, for the transfer of US $1.215 million from the Wil-Bao USD account to its RMB account for specified purposes. Preston Jones thereafter signed and forwarded other authorization letters addressed to the Ling Bao branch authorizing the transfer of $135,000 and $63,250, respectively.

27. Notwithstanding the above acceptances, promises and representations of the Bank of China, within a few months after the Wil-Bao USD account was opened, approximately US $1.8 million dollars was improperly withdrawn from the account through a series of transfers and other withdrawals initiated by Yue but without the proper authorization of Wil-Bao, Orient Mineral or Preston Jones.

28. Among the improper transfers were two illegal conversions to local RMB currency of $50,000 and $40,000 on June 4 and June 5, 1996, respectively, permitted and effected by the Bank of China during the first week of account opening, without the approval of the SAEC.

29. Other improper transfers were four withdrawals also allowed within days and weeks of account opening, totaling $178,225 (in local RMB currency) to a fashion shop and a pharmaceutical company. Such transfers were suspicious on their face as bearing no relation to the stated mining purposes of the Wil-Bao joint venture, as known to the Bank's officers.

30. The bank officers further permitted a wire transfer in the sum of $400,000 to an account

maintained by Defendant Saren Gaowa at Zions First National Bank in Salt Lake City, Utah on or about August 22, 1996. This transfer (as it was later discovered) was initiated by Defendant Yue without the required authorization of Preston Jones. This transfer was illegal and fraudulent on its face, as consisting of the transfer of $400,000 of registered capital belonging to a Sino-U.S. joint venture, Wil-Bao, to an individual without SAEC approval or any documentation, which further was identified as "refund of investment" which only Orient Mineral or its designated agent should receive.

31. The bank officers also permitted the illegal transfer of US $1 million to the Industrial and Commercial Bank of China ("ICBC") on or about October 18, 1996, which they knew was collateral for a loan, which they further knew would constitute illegal access to capital in excess of the approved total investment of the Wil-Bao joint venture.

32. The bank officers permitted another unauthorized transfer of $100,000 on or about May 8, 1997.

33. In sum, Yue improperly transferred or withdrew approximately $1.8 million from the Wil-Bao USD account without the required authorization of Preston Jones. Yue used these funds personally to invest in businesses in which neither Wil-Bao nor Orient Mineral had any interest, or to pay personal expenses of Yue. All the improper transfers or withdrawals made by Yue were done with the knowledge and consent of the Bank of China, Does 1-20, Gaowa and Yue.

34. Presently, Yue is incarcerated in China after having been convicted of criminal charges arising from the embezzlement of funds from Wil-Bao.

B. Yue's Schemes With Third Parties

(1) Gaowa

35. The transfer of the funds into the account of Gaowa was done with her knowledge and consent to Yue's scheme to defraud Paintiffs and embezzle funds from them.

(2) Jiaocun Town

36. The Chinese party to the joint venture, Jiaocun Gold Co., was a government-owned entity formed by Jiaocun Town of Ling Bao City. The town appointed three directors to Wil-Bao on behalf of the Chinese party, including its mayor and another local official, Zhang Fang Xing, who was also Vice General Manager to Yue, the General Manager of Wil-Bao.

37. In late 1995 and early 1996, Yue and Mr. Zhang traveled to Salt Lake City, Utah and San Francisco, California, for purposes, *inter alia*, of assuring Orient Mineral and its investor that the Chinese party would perform its obligations, and that the investment of Orient Mineral would be repaid before both parties shared in profits of Wil-Bao. The obligations of the Chinese party included that it would contribute the right to use two mines and land valued at US $900,000 as its 30%

contribution to the US $3 million capital of the joint venture.

38. Neither Jiaocun Town nor Jiaocun Gold Co. held title or rights to the mines and land represented to be their capital contribution to the joint venture, and with Yue, knowingly entered into a conspiracy to defraud Plaintiffs by representing otherwise and inducing Orient Mineral to advance US $900,000 in cash on behalf of the Chinese party, in addition to its own 70% or US $2.1 million cash contribution to the joint venture.

39. Yue and the Chinese party entered into a further conspiracy to defraud Plaintiffs by falsely representing that Jiaocun Town held title and rights in a mill to be purchased for $450,000 from the $3 million investment. On May 29, 1996, Preston Jones authorized such funds to be transferred from Wil-Boa's USD account to its RMB account, but such purchase never occurred, and Yue and/or Jiaocun Town diverted the funds for their own purposes.

* * *

(4) <u>ICBC Complicit Fraudulent Transaction and Illegal Account</u>

41. In October 1996, Yue conspired with bank management of ICBC to illegallyaccess approximately one million dollars equivalent in RMB by transferring USD $1 million of Wil Bao capital from Bank of China and pledging these funds as collateral for an RMB loan.

42. Such a loan constituted a violation of the restrictions of Wil Bao's investment approval and licenses because it allowed the joint venture (by Yue) to access funds in excess of the $3 million in capital, which had fully capitalized its approved investment.

43. In so doing, ICBC further permitted, in violation of central bank regulations, the establishment by Wil Bao of a second "basic" RMB account.

44. The effect of both actions by ICBC, with the knowledge of the Bank of China, was to aid and abet an attempt by Yue to embezzle an additional $1 million from Wil Bao, as part of an unauthorized and illegal transfer on October 18, 1996 of $1 million from the Bank of China to the ICBC.

FIRST CAUSE OF ACTION

(Fraud and Misrepresentation Against Defendants Yue, Bank of China and Does 1-20)

* * *

51. With the knowledge that such transfers were in violation of the Orient Mineral and Wil-Bao agreements, the Bank of China and Does 1-20 actively assisted Yue in making numerous withdrawals and transfers in excess of $25,000 without the consent of Preston Jones. Moreover, Yue made numerous other withdrawals from the Wil-Bao account in amounts less than $25,000 that were not used for any purpose authorized by Wil-Bao. These transfers, too, were made by the Bank and with the

actual knowledge of the Bank and Does 1-20 that such transfers were in violation of Yue's fiduciary duties to Plaintiffs.

* * *

SECOND CAUSE OF ACTION

(Breach of Contract Against Defendant Bank of China)

* * *

57. Bank of China breached the aforementioned duty to Orient Mineral by, among other things, (a) failing to follow directions given by Preston Jones as its sole and exclusive representative to maintain its suspense account or open a new Orient Mineral account, or alternatively to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and control, and (b) failing to take reasonable safeguards to prevent the unauthorized transfer of funds from the Wil-Bao USD account by Yue.

* * *

THIRD CAUSE OF ACTION

(Negligence Against Bank of China)

66. Bank of China breached the aforementioned duties to Orient Mineral by, among other things, (1) failing to follow directions given by Preston Jones as its sole and exclusive representative to maintain its suspense account or

open a new Orient Mineral account, or alternatively to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and control; (2) failing to be alert to suspicious circumstances and fraud on account opening and upon transfer of the full $3 million from the suspense account to the Wil-Bao USD account, relying on the interpretation of Yue, who would thereby possess exclusive control; (3) failing to take reasonable safeguards to prevent the unauthorized transfer of funds from the Wil-Bao USD account by Yue in light of the facts known to the Bank at the time of the transfers; and (4) failing to raise regulatory issues or restrictions that required that the transfer not be made, and that regulatory approval was required.

* * *

FOURTH CAUSE OF ACTION

(Conspiracy to Commit Fraud Against Yue, Gaowa Bank of China and Does 1-20)

* * *

70. In or about May 1996, and continuing thereafter, the Defendants and each of them knowingly entered into a conspiracy to defraud Plaintiffs and deprive Plaintiffs of valuable property rights. Overt acts in furtherance of the conspiracy include, but are not limited to:

(1) the May 14, 1996 Bank of China commitment letter prepared by Liu for Yue,

intended to induce Orient Mineral to transfer US $3 million from the United States to the Ling Bao branch of the Bank of China;

(2) a staged meeting with the three bank officers on May 27, 1996 to effect the transfer of $3 million from Orient Mineral's control to Wil-Bao's USD account subject to Yue's control;

(3) the total failure by the three bank officers to perform normal "know-your-customer" due diligence at the meeting, and to advise of or raise any regulatory issues or restrictions;

(4) the utter failure to follow any of Orient Mineral's alternative directions given by Preston Jones, which the bank officers knew was its sole and exclusive representative;

(5) the utter failure to follow Wil-Bao's directions given by Preston Jones;

(6) the illegal opening and operation of the Wil-Bao USD foreign exchange account without a required SAEC registration certificate, failure to open instead an SAEC-approved temporary USD account with a complete block on transfers, and failure to convert the USD account to a capital account by September 30, 1996 or close the account, thereby avoiding SAEC oversight in each instance;

(7) the complicit failure to exercise regulatory oversight in permitting illegal conversions of USD foreign exchange to local RMB currency, without SAEC approval, within days of account opening;

(8) the illegal permitting of transfers that were fraudulent on their face, and repeated, complicit failure to exercise regulatory oversight, including but not limited to: (a) the transfer of $400,000 of company foreign exchange capital to an individual without SAEC approval or any documentation, which further was identified as "refund of investment" which only Orient Mineral or its designated agent should receive, and (b) the transfer of US $1 million to the ICBC which the bank officers knew was collateral for a loan, which they further knew would constitute illegal access to capital in excess of the approved total investment of the Wil-Bao joint venture; and

(9) highly suspicious conduct inconsistent with professionalism, including failure to maintain key documents and translations in bank files, and incredible and specious justifications for failures, lapses of regulatory oversight, and illegal misconduct.

* * *

NINTH CAUSE OF ACTION

(Negligent Misrepresentation Against Bank of China and Does 1-20)

100. The Bank, however, either did not understand the instructions, resolutions and restrictions on the account or did not have adequate safeguards in place to prevent the unauthorized withdrawals by Yue. Either way, the Bank negligently represented to Plaintiffs that it would not allow (a) an Orient Mineral suspense or other control account, and (b) withdrawals from the Wil-Bao USD account other than as instructed by Preston Jones or as set forth in the resolutions presented to it. The representations were made with the intent of inducing (a) Orient Mineral to transfer funds from the United States to the Ling Bao branch, and/or (b) Plaintiffs to transfer funds into the Wil-Bao account. Had Plaintiffs known that the Bank did not understand the directions of Preston Jones, or have adequate safeguards in place to prevent unauthorized withdrawals, or that the Bank did not understand the instructions contained in the resolutions, Plaintiffs would not have opened the Orient Mineral suspense account or the Wil-Bao USD account or transferred any funds into them.

* * *

SUPPLEMENTAL APPENDIX C — EXCERPTS FROM DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, FILED JANUARY 26, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Civil No. 2:98-CV-238J

ORIENT MINERAL COMPANY, and WIL-BAO MINERAL CO., LTD.,

Plaintiffs,

vs.

BANK OF CHINA, DAVID YUE aka YIAOQUN YUE, and SAREN GAOWA,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FED. R. CIV. P 52(a)) AND ORDER RE: PENDING MOTIONS

* * *

74. After the loan documents had been executed, Plaintiffs initiated the wire transfer of the US$ 3 million to China on May 21, 1996, through the Bank of China's branch office in New York. (PX-148, PX-149; Tr. 417104 Rm., at 69:7-72:9 (Mr. Jones)).

* * *

427. The conduct of the persons present at the May 27th meeting is consistent with the inference that Mr. Yue did not communicate to Mr. Wang, Mme. Liu or Mme Thou any directions by Mr. Jones concerning limitations to be imposed upon expenditures from the Wil-Bao U.S. dollar account, and is likewise consistent with the finding based upon Mr. Wilson's trial testimony that the May 24th Wil-Bao board resolution was presented to Mr. Wang at the May 29th meeting, not at the meeting on May 27th. . . .

* * *

429. In contrast to the May 16th board resolution and cover letter designating Jones as Orient Mineral's sole authorized representative in dealing with Orient Mineral's wired funds (PX-8), nothing presented to the Bank at the May 27th meeting designated Jones as *Wil-Bao's* "special director" with equivalent authority over the opening of, or transactions to be conducted in the Wil-Bao U.S. dollar account. Absent that, designation in a communication addressed to the Bank, the Bank's

officers present at the May 27th meeting were not alerted to any specific need to ascertain the intentions of Mr. Jones concerning the *Wil-Bao* account through direct communication with Jones, in contract to following Wil-Bao's directions as communicated to the Bank by or through Wil-Bao's general manager and director, Mr. Yue – all in the presence of Wil-Bao's chairman and director (Wilson), its director and legal counsel (Eck), and a fourth director (Jones), each of whom had been introduced to the Bank officers at the meeting.

* * *